

May 12, 2005

Laura C. Kuhn  
Community Development Director / Deputy City Manager  
City of Scotts Valley  
One Civic Center Drive  
Scotts Valley, California 95066

**Re: Your Request for Informal Assistance**  
**Our File No. A-05-069**

Dear Ms. Kuhn:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Though you have provided information concerning your contemplated participation in several aspects of the redevelopment project described below, our advice extends only to whether you have a conflict-of-interest with regard to the proposed relocation of certain propane facilities. Please note that the Commission does not act as a finder of fact when providing assistance; this assistance is based solely on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### **QUESTION**

Do you have a conflict-of-interest with specific regard to the decision to relocate the City’s propane facilities?

### **CONCLUSION**

It is presumed that you do not. Since the information you provided indicates that the site to which the propane facility would be relocated is over 500 feet away from your

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All further references to statutory “sections” will be to the Government Code and all further references to “regulations” will be to title 2 of the California Code of Regulations, unless otherwise indicated.

home, it is presumed that such a decision would not have a material effect on your financial interest in your home.

## **FACTS**

You are the Community Development Director, and Deputy City Manager, for the City of Scotts Valley (“City”). You own a home on Green Valley Road which, according to scale maps you enclosed with your correspondence, is situated over 2,000 feet from the nearest of two parcels where propane distribution and storage facilities are currently located. You do not identify any financial interest, other than your home, which might be affected by the contemplated governmental decisions described in your correspondence.

### ***Propane Facility Relocation***

The City is currently working on a redevelopment project (“Project”). One aspect of the Project contemplates the relocation of the propane facilities to a single parcel within the Project area (90 Lockhart Gulch Road) that is approximately 1,100 feet from your home. The Lockhart Gulch parcel also happens to constitute the part of the Project area which is nearest to your home.<sup>2</sup>

You indicate that you have contacted a local real estate professional with over 30 years of experience in the Scotts Valley area. This agent was familiar with your neighborhood, your home, and the proposed location of the propane tanks. Because your property is over 1,000 feet away and the propane tank installations would not be visible from your home, the agent confirmed that the new propane facility would not have an impact on your property value, unless for some reason the propane facility relocation would trigger the need for some real estate disclosure upon the sale of your home. After consultation with the Scotts Valley Fire District Fire Chief, it was determined that so long as the current safety measures are used on the propane tanks at the new location, real estate disclosures should not be required.

Other than to describe the propane facility relocation plan itself, and the general goal of consolidating parcels for the construction of a mixed use town center, you do not describe other aspects of the Project in any detail.

### ***Other Aspects Of The Project***

In connection with the Project, you indicate that the California Environmental Quality Act requires that an environmental review evaluate the totality of the Project. Therefore, you anticipate that one Environmental Impact Report (EIR) would be done for the Project generally, and not just be limited to an evaluation of the propane facility relocation. Absent a disqualifying conflict-of-interest, you intend to direct the work flow

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<sup>2</sup> On one map enclosed with your correspondence, there is a drawing of a path bordering your home labeled “Potential Location of Emergency Access Rd.” Because you make no mention of this road in your correspondence, and because it is drawn outside the Project area, we do not opine as to the effect, if any, such a road might have on this conflict-of-interest analysis.

of a consultant in preparing the EIR, including the development of required mitigation measures for the Project. You do not detail what mitigation measures might be contemplated for the propane facility relocation or other aspects of the Project, or where such mitigation areas might be located in relation to your home.

You also indicate that, absent a conflict-of-interest, your role as Community Development Director would normally entail daily activities including working with the Project developer on unspecified aspects of the plan not necessarily, solely related to relocation of the propane facility. You would also be directly involved in negotiating development and disposition agreements with the developer and processing land use entitlements such as a re-zoning and planned development permits for the Project generally. Again, it appears that such work would not be solely related to the contemplated propane facility relocation.

Though you have provided us sufficient detail to allow us to evaluate your potential conflicts-of-interest with regard to the propane relocation aspect of the Project, you have not done so with regard to potential governmental decisions associated with other aspects of the Project. Because we have no information regarding, for instance, where potential parcels may be located to mitigate the effects of any aspects of the Project (whether related to the propane facility relocation or not), we cannot evaluate whether your work on the EIR or with the Project's developer will or will not give rise to a conflict-of-interest. You have also not provided us with any detail regarding the development and disposition agreements you might be negotiating with the developer, or the land use entitlements you might be processing for the Project generally.

Because of this lack of information regarding aspects of the Project not directly related to the propane facility relocation, we cannot advise you as to whether your contemplated work on the Project, generally, would give rise to conflicts-of-interest. Therefore, the remainder of this letter focuses solely on whether your working on the propane facility relocation itself (and unrelated to any potential mitigation plans) would constitute a conflict-of-interest. By providing you with such an analysis, we hope to guide you as to how to evaluate whether you might have a conflict-of-interest with regard to other contemplated governmental decisions not detailed in your correspondence.

### **ANALYSIS**

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence governmental decisions in which the official has a financial interest, unless some exception applies.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Reg. 18700(b).) The general rule, however, is that a conflict-of-interest exists whenever a public official makes a

governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

**Steps 1 & 2: As Community Development Director and Deputy City Manager, Are You a Public Official Making, Participating in Making, or Influencing a Governmental Decision?**

You are the Community Development Director and Deputy City Manager for the City of Willits. In that capacity, you would be involved in working on decisions associated with the relocation of propane facilities.

Because you are a member or officer of a local government agency in either of these roles, you are a public official under the Act. (Section 82048; see Reg. 18701(a) [defining “public official”].) Additionally, you have described yourself as one who occupies a position which requires you to make, participate in making, and/or influencing governmental decisions regarding the details of the Project. (See Regs. 18702 – 18702.4.) Consequently, barring any applicable exception, you are prohibited from making, participating in making, or otherwise using your official position to influence any decision which will have a reasonably foreseeable material financial effect on any economic interest you may have.

**Step 3: Do You Have A Potentially Disqualifying Economic Interest?**

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any of the following types of interests:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Reg. 18703.1(a)), or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Reg. 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Reg. 18703.2; see Section 82033 [defining “Interest in real property”]);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Reg. 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); Reg. 18703.4);
- An economic interest in his or her personal finances, including those of his or her

immediate family -- this is the 'personal financial effects' rule. (Section 87103; Reg. 18703.5.)

Since the only economic interest you refer to in your letter refers to your owning your own home, the following analysis is limited to whether your home constitutes a potentially disqualifying economic interest.

As indicated above, a public official has an economic interest in real property in which he or she has a direct or indirect<sup>3</sup> interest of \$2,000 or more. (Section 87103(b); Reg. 18703.2.) Since we assume that your home is worth in excess of \$2,000, your home constitutes an economic interest in real property.

#### **Step 4: Is The Economic Interest Directly or Indirectly Involved in The Governmental Decision?**

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Reg. 18704(a).)

Real property in which a public official has an economic interest is directly involved in a governmental decision if any part of the real property is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. (Reg. 18704.2(a)(1).)

Since your home is over 500 feet from the nearest boundary of the parcel to which the propane facility would be relocated, your economic interest is indirectly involved in proposed governmental decisions affecting propane facility relocation to that area.

#### **Step 5: Materiality Standard**

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regs. 18700(a), 18705.) Different standards apply to determine whether a financial effect will be material, depending upon the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision under consideration. (Reg. 18705.2, subs.(a) and (b).)

Since we have determined that your financial interest in your home is indirectly involved in the contemplated propane facility relocation, the financial effect of such a decision on your home is presumed not to be material. (Reg. 18705.2(b)(1).) This presumption is bolstered (but not conclusively established) by the information you have

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<sup>3</sup> An indirect investment or interest in real property means, among other things, any real property owned by a business entity in which the official (or his or her immediate family member) owns directly, indirectly, or beneficially a 10-percent interest or greater. (Section 82033.)

obtained from an experienced real estate agent and the Scotts Valley Fire District Fire Chief regarding the effect the contemplated propane relocation might have on the value of your home.

The presumption of immateriality may be rebutted by presenting proof that it is reasonably foreseeable that the contemplated ordinances *will* have a material financial effect on the value of your home. (*Ibid.*) Examples of specific circumstances that would be considered in a challenge to the presumption include:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.” (Reg. 18705.2(b)(1)(A) – (C).)

#### **Step 6: Reasonably Foreseeable**

If the effect of a governmental decision on the financial interest of the public official is predicted to be material if it occurs, the next step is to determine if it is *reasonably foreseeable* that the material effect would occur. (Reg. 18706(a).) But since we have determined that it is presumed that the proposed relocation of the propane facility will *not* have a material effect on the value of your home, an analysis of this step is unnecessary.

#### **Steps 7 & 8: The “Public Generally” and “Legally Required” Exceptions**

If we had determined that a conflict-of-interest existed, regarding the proposed governmental decision discussed above and your economic interest in your home, we would then examine whether you could still participate in the described governmental decision-making process under either the “public generally” or “legally required participation” exceptions contained in the Act. (See Regs. 18707 et seq. and 18708 et seq.)

If neither exception applied, then the conflict-of-interest would be deemed to be a disqualifying conflict-of-interest and you would not be able to participate in making or influencing a governmental decision regarding the proposed relocation of the propane facility. The following information is provided as a general guide to be applied to future questions you may have.

#### *The “Public Generally” Exception*

Regulation 18707, subdivision (a), states that a public official will not be disqualified from participating in governmental decisions if the proposed decision affects

the public official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the "public generally." In order for your home to meet the requirements under this exception, there needs to be a "significant segment" of property owners or homeowners affected in "substantially the same manner." (Reg. 18707.1.)

There are two different "significant segment" tests: the percentage test and the number test. The percentage test states that if 10% of property owners or homeowners in the jurisdiction are affected in a similar manner, the exception may apply. (Reg. 18707.1, subd. (b)(1)(B)(i).) The number test states that if 5,000 property owners or homeowners in the jurisdiction are affected in a similar manner, the exception may also apply. (Reg. 18707.1(b)(1)(A)(ii).) If either of these tests applies, then it must be determined whether the property owners or homeowners affected are affected in "substantially the same manner." (Reg. 18707.1(b)(2).) As noted above, we do not have sufficient facts to apply this exception.

*The "Legally Required Participation" Exception*

Section 87101 states that even if a public official has a conflict-of-interest, he or she is not prohibited from making, participating in making or influencing a governmental decision, to the extent that his or her participation is "legally required." (See also Reg. 18708.) Should such a determination be made, Regulation 18708 sets out rules by which the public official must disclose her conflict-of-interest.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: Andreas C. Rockas  
Staff Counsel, Legal Division

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